

Chapter 22

Subpoena Powers for Aid of Criminal Investigation and Grants of Immunity

77-22-1 Declaration of necessity.

It is declared, as a matter of legislative determination, that it is necessary to grant subpoena powers in aid of criminal investigations and to provide a method of keeping information gained from investigations secret both to protect the innocent and to prevent criminal suspects from having access to information prior to prosecution.

Amended by Chapter 296, 1997 General Session

77-22-2 Investigations -- Right to subpoena witnesses and require production of evidence -- Contents of subpoena -- Rights of witnesses -- Interrogation before closed court -- Disclosure of information.

- (1) As used in this section, "prosecutor" means the attorney general, county attorney, district attorney, or municipal attorney.
- (2)
 - (a) In any matter involving the investigation of a crime or malfeasance in office, or any criminal conspiracy or activity, the prosecutor may, upon application and approval of the district court and for good cause shown, conduct a criminal investigation.
 - (b) The application and statement of good cause shall state whether or not any other investigative order related to the investigation at issue has been filed in another court.
- (3)
 - (a) Subject to the conditions established in Subsection (3)(b), the prosecutor may:
 - (i) subpoena witnesses;
 - (ii) compel their attendance and testimony under oath to be recorded by a suitable electronic recording device or to be given before any certified court reporter; and
 - (iii) require the production of books, papers, documents, recordings, and any other items that constitute evidence or may be relevant to the investigation.
 - (b) The prosecutor shall:
 - (i) apply to the district court for each subpoena; and
 - (ii) show that the requested information is reasonably related to the criminal investigation authorized by the court.
- (4)
 - (a) The prosecutor shall state in each subpoena:
 - (i) the time and place of the examination;
 - (ii) that the subpoena is issued in aid of a criminal investigation; and
 - (iii) the right of the person subpoenaed to have counsel present.
 - (b) The examination may be conducted anywhere within the jurisdiction of the prosecutor issuing the subpoena.
 - (c) The subpoena need not disclose the names of possible defendants.
 - (d) Witness fees and expenses shall be paid as in a civil action.
- (5)
 - (a) At the beginning of each compelled interrogation, the prosecutor shall personally inform each witness:
 - (i) of the general subject matter of the investigation;

- (ii) of the privilege to, at any time during the proceeding, refuse to answer any question or produce any evidence of a communicative nature that may result in self-incrimination;
 - (iii) that any information provided may be used against the witness in a subsequent criminal proceeding; and
 - (iv) of the right to have counsel present.
- (b) If the prosecutor has substantial evidence that the subpoenaed witness has committed a crime that is under investigation, the prosecutor shall:
 - (i) inform the witness in person before interrogation of that witness's target status; and
 - (ii) inform the witness of the nature of the charges under consideration against the witness.
- (6)
 - (a)
 - (i) The prosecutor may make written application to any district court showing a reasonable likelihood that publicly releasing information about the identity of a witness or the substance of the evidence resulting from a subpoena or interrogation would pose a threat of harm to a person or otherwise impede the investigation.
 - (ii) Upon a finding of reasonable likelihood, the court may order the:
 - (A) interrogation of a witness be held in secret;
 - (B) occurrence of the interrogation and other subpoenaing of evidence, the identity of the person subpoenaed, and the substance of the evidence obtained be kept secret; and
 - (C) record of testimony and other subpoenaed evidence be kept secret unless the court for good cause otherwise orders.
 - (b) After application, the court may by order exclude from any investigative hearing or proceeding any persons except:
 - (i) the attorneys representing the state and members of their staffs;
 - (ii) persons who, in the judgment of the attorneys representing the state, are reasonably necessary to assist in the investigative process;
 - (iii) the court reporter or operator of the electronic recording device; and
 - (iv) the attorney for the witness.
 - (c) This chapter does not prevent attorneys representing the state or members of their staff from disclosing information obtained pursuant to this chapter for the purpose of furthering any official governmental investigation.
 - (d)
 - (i) If a secrecy order has been granted by the court regarding the interrogation or disclosure of evidence by a witness under this subsection, and if the court finds a further restriction on the witness is appropriate, the court may order the witness not to disclose the substance of the witness's testimony or evidence given by the witness to others.
 - (ii) Any order to not disclose made under this subsection shall be served with the subpoena.
 - (iii) In an appropriate circumstance the court may order that the witness not disclose the existence of the investigation to others.
 - (iv) Any order under this Subsection (6)(d) must be based upon a finding by the court that one or more of the following risks exist:
 - (A) disclosure by the witness would cause destruction of evidence;
 - (B) disclosure by the witness would taint the evidence provided by other witnesses;
 - (C) disclosure by the witness to a target of the investigation would result in flight or other conduct to avoid prosecution;
 - (D) disclosure by the witness would damage a person's reputation; or
 - (E) disclosure by the witness would cause a threat of harm to any person.
 - (e)

- (i) If the court imposes an order under Subsection (6)(d) authorizing an instruction to a witness not to disclose the substance of testimony or evidence provided and the prosecuting agency proves by a preponderance of the evidence that a witness has violated that order, the court may hold the witness in contempt.
 - (ii) An order of secrecy imposed on a witness under this Subsection (6)(e) may not infringe on the attorney-client relationship between the witness and the witness's attorney or on any other legally recognized privileged relationship.
- (7)
 - (a)
 - (i) The prosecutor may submit to any district court a separate written request that the application, statement of good cause, and the court's order authorizing the investigation be kept secret.
 - (ii) The request for secrecy is a public record under Title 63G, Chapter 2, Government Records Access and Management Act, but need not contain any information that would compromise any of the interest listed in Subsection (7)(c).
 - (b) With the court's permission, the prosecutor may submit to the court, in camera, any additional information to support the request for secrecy if necessary to avoid compromising the interests listed in Subsection (7)(c).
 - (c) The court shall consider all information in the application and order authorizing the investigation and any information received in camera and shall order that all information be placed in the public file except information that, if disclosed, would pose:
 - (i) a substantial risk of harm to a person's safety;
 - (ii) a clearly unwarranted invasion of or harm to a person's reputation or privacy; or
 - (iii) a serious impediment to the investigation.
 - (d) Before granting an order keeping secret documents and other information received under this section, the court shall narrow the secrecy order as much as reasonably possible in order to preserve the openness of court records while protecting the interests listed in Subsection (7)(c).

Amended by Chapter 6, 2009 General Session

77-22-2.5 Court orders for criminal investigations for records concerning an electronic communications system or service or remote computing service -- Content -- Fee for providing information.

- (1) As used in this section:
 - (a)
 - (i) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system.
 - (ii) "Electronic communication" does not include:
 - (A) any wire or oral communication;
 - (B) any communication made through a tone-only paging device;
 - (C) any communication from a tracking device; or
 - (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.
 - (b) "Electronic communications service" means any service which provides for users the ability to send or receive wire or electronic communications.

- (c) "Electronic communications system" means any wire, radio, electromagnetic, photooptical, or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of the communication.
- (d) "Internet service provider" has the same definition as in Section 76-10-1230.
- (e) "Prosecutor" has the same definition as in Section 77-22-2.
- (f) "Remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system.
- (g) "Sexual offense against a minor" means:
 - (i) sexual exploitation of a minor as defined in Section 76-5b-201 or attempted sexual exploitation of a minor;
 - (ii) a sexual offense or attempted sexual offense committed against a minor in violation of Title 76, Chapter 5, Part 4, Sexual Offenses;
 - (iii) dealing in or attempting to deal in material harmful to a minor in violation of Section 76-10-1206; or
 - (iv) enticement of a minor or attempted enticement of a minor in violation of Section 76-4-401.
- (2) When a law enforcement agency is investigating a sexual offense against a minor, an offense of stalking under Section 76-5-106.5, or an offense of child kidnapping under Section 76-5-301.1, and has reasonable suspicion that an electronic communications system or service or remote computing service has been used in the commission of a criminal offense, a law enforcement agent shall:
 - (a) articulate specific facts showing reasonable grounds to believe that the records or other information sought, as designated in Subsections (1)(c)(i) through (v), are relevant and material to an ongoing investigation;
 - (b) present the request to a prosecutor for review and authorization to proceed; and
 - (c) submit the request to a magistrate for a court order, consistent with 18 U.S.C. 2703 and 18 U.S.C. 2702, to the electronic communications system or service or remote computing service provider that owns or controls the Internet protocol address, websites, email address, or service to a specific telephone number, requiring the production of the following information, if available, upon providing in the court order the Internet protocol address, email address, telephone number, or other identifier, and the dates and times the address, telephone number, or other identifier was suspected of being used in the commission of the offense:
 - (i) names of subscribers, service customers, and users;
 - (ii) addresses of subscribers, service customers, and users;
 - (iii) records of session times and durations;
 - (iv) length of service, including the start date and types of service utilized; and
 - (v) telephone or other instrument subscriber numbers or other subscriber identifiers, including any temporarily assigned network address.
- (3) A court order issued under this section shall state that the electronic communications system or service or remote computing service provider shall produce any records under Subsections (2)(c)(i) through (v) that are reasonably relevant to the investigation of the suspected criminal activity or offense as described in the court order.
- (4)
 - (a) An electronic communications system or service or remote computing service provider that provides information in response to a court order issued under this section may charge a fee, not to exceed the actual cost, for providing the information.
 - (b) The law enforcement agency conducting the investigation shall pay the fee.

- (5) The electronic communications system or service or remote computing service provider served with or responding to the court order may not disclose the court order to the account holder identified pursuant to the court order for a period of 90 days.
- (6) If the electronic communications system or service or remote computing service provider served with the court order does not own or control the Internet protocol address, websites, or email address, or provide service for the telephone number that is the subject of the court order, the provider shall notify the investigating law enforcement agency that it does not have the information.
- (7) There is no cause of action against any provider or wire or electronic communication service, or its officers, employees, agents, or other specified persons, for providing information, facilities, or assistance in accordance with the terms of the court order issued under this section or statutory authorization.
- (8)
 - (a) A court order issued under this section is subject to the provisions of Title 77, Chapter 23b, Access to Electronic Communications.
 - (b) Rights and remedies for providers and subscribers under Title 77, Chapter 23b, Access to Electronic Communications, apply to providers and subscribers subject to a court order issued under this section.
- (9) Every prosecutorial agency shall annually on or before February 15 report to the Commission on Criminal and Juvenile Justice:
 - (a) the number of requests for court orders authorized by the prosecutorial agency;
 - (b) the number of orders issued by the court and the criminal offense, pursuant to Subsection (2), each order was used to investigate; and
 - (c) if the court order led to criminal charges being filed, the type and number of offenses charged.

Amended by Chapter 99, 2015 General Session

77-22-4 Investigation records to be filed with court.

In all investigations under Section 77-22-2, the attorney general, county attorney, or district attorney shall maintain and file with the district court the following records of the criminal investigation, unless otherwise ordered by the court:

- (1) a copy of the good cause statement and application for the authorization of the criminal investigation;
- (2) a copy of all motions made to the court by the attorney general, the county attorney, or the district attorney;
- (3) a copy of all court orders;
- (4) a copy of all subpoenas issued;
- (5) detailed descriptions of all documents and other evidence produced in response to subpoenas;
- (6) a copy of all transcripts of testimony taken pursuant to the subpoena; and
- (7) a copy of all written communications between the court and the attorney general, county attorney, or district attorney, and staff.

Amended by Chapter 38, 1993 General Session

77-22-4.5 Prosecutorial authority to compromise an offense regarding a witness.

- (1) As used in this section, "prosecutor" includes the state attorney general and any assistant, a district attorney and any deputy, a county attorney and any deputy, and a municipal prosecutor and any deputy.

- (2) This chapter does not prohibit or limit the authority of a prosecutor to divert, reduce, or compromise any criminal charge against a witness or other party when the witness voluntarily enters into an agreement to provide testimony or other evidence against himself or another accused in consideration for the diversion, reduction, or compromise if:
- (a) the prosecutor holds authority to prosecute the offense against the witness or other party; and
 - (b) the complete agreement with the witness is in writing and a copy of the agreement is given to the witness.
- (3) Any agreement under Subsection (2) is subject to discovery by counsel for the accused in any prosecution in which the witness with whom the agreement is made has agreed to testify.

Enacted by Chapter 115, 1995 General Session

77-22-5 Prosecutorial powers.

The powers of this chapter are in addition to any other powers granted to the attorney general or county attorneys.

Enacted by Chapter 123, 1989 General Session